Office-Supreme Court, U.S.
FILED
MAY 31 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1458 and 82-1526

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT M. RAPAPORT, PETITIONER

v.

UNITED STATES OF AMERICA

INGREDIENT TECHNOLOGY CORPORATION, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the court of appeals was correct in determining that the Internal Revenue Code and regulations thereunder gave the petitioners fair notice that the conduct for which they were convicted was illegal.

2. Whether the court of appeals used the correct standard in judging the issue of fair notice.

3. Whether the court of appeals was correct in upholding the district court's exclusion of expert testimony on the law applicable to petitioners' conduct and its refusal to instruct the jury that it could consider the asserted unclarity of the law in assessing the issue of willfulness.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Bouie v. *City of Columbia*, 378 U.S. 347	9
Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337	11
Brooks-Massey Dodge, Inc. v. *Commissioner*, 60 T.C. 884	9
Commissioner v. *Court Holding Co.*, 324 U.S. 331	8
Commissioner v. *Wilcox*, 327 U.S. 404	9, 10
Cooley v. *United States*, 501 F.2d 1249, cert. denied, 419 U.S. 1123	14
Douglas v. *Buder*, 412 U.S. 430	9
Francisco Sugar Co. v. *Commissioner*, 47 F.2d 555	7, 10
Glazer v. *Commissioner*, 44 T.C. 541	8
Gorin v. *United States*, 312 U.S. 19	11
Grant Oil Tool Co. v. *United States*, 381 F.2d 389	7
Gregory v. *Helvering*, 293 U.S. 465	8
Griffiths v. *Commissioner*, 308 U.S. 355	8
Higgins v. *Smith*, 308 U.S. 473	8
Hygrade Provision Co. v. *Sherman*, 266 U.S. 497	11
James v. *United States*, 366 U.S. 213	9

Cases—Continued: Page

Knetsch v. *United States*, 364 U.S. 361 8

Latimer-Looney Chevrolet, Inc. v. *Commissioner*, 19 T.C. 120 10

Lisansky v. *United States*, 31 F.2d 846, cert. denied, 279 U.S. 873 14

Loeb v. *Hammond*, 407 F.2d 779 14

Marks v. *United States*, 430 U.S. 188 9

Marx & Co. v. *Diners' Club, Inc.* 550 F.2d 505, cert. denied, 434 U.S. 861 14

Nottingham, Estate of, 25 T.C.M. (P-H) ¶ 56,281 9

Pierce-Arrow Motor Car Co. v. *United States*, 9 F. Supp. 577..... 7-8

Rutkin v. *United States*, 343 U.S. 130..... 9

Screws v. *United States*, 325 U.S. 91 11

United States v. *Baskes*, 687 F.2d 165..... 13

United States v. *Bronston*, 658 F.2d 920, cert. denied, 456 U.S. 915 13-14

United States v. *Caserta*, 199 F.2d 905 14

United States v. *Clardy*, 612 F.2d 1139.... 13

United States v. *Critzer*, 498 F.2d 1160.... 9-10

United States v. *Garber*, 607 F.2d 92 ... 7, 12-13, 14, 15

United States v. *Herzog*, 632 F.2d 469, rehearing denied, 636 F.2d 315..... 17

United States v. *Ragen*, 314 U.S. 513 11

White v. *United States*, 216 F.2d 1 14

William Powell Co. v. *United States*, 524 F. Supp. 841 8

Statutes and regulation:

18 U.S.C. 371 2

Statutes and regulation—Continued Page

26 U.S.C. 472(c) 8

26 U.S.C. 7206(1) 2

26 U.S.C. 7206(2) 2

Treas. Reg. on Income Tax, 26 C.F.R. 1.471-1 ..... 7, 9

Miscellaneous:

Rev. Rul. 60-243, 1960-2 Cum. Bull. 160 ... 9

Rev. Rul. 79-188, 1979-1 Cum. Bull. 191 ... 10

7 J. Wigmore, *Wigmore on Evidence* (Chadbourn rev. 1978) 14

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1458

ROBERT M. RAPAPORT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-1526

INGREDIENT TECHNOLOGY CORPORATION, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26)[1] is reported at 698 F.2d 88.

JURISDICTION

The judgment of the court of appeals (Pet. App. A27-A28) was entered on January 5, 1983. The petition for a writ of certiorari in No. 82-1458 was filed on February 28, 1983. The petition in No. 82-1526 was filed on March 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1] "Pet. App." refers to the appendix to the petition in No. 82-1458.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to evade SuCrest's (now Ingredient Technology Corporation) corporate federal income tax for fiscal 1975, in violation of 18 U.S.C. 371 (Count One), and conspiracy to defraud the United States by impeding the Department of the Treasury in the collection of revenue in connection with SuCrest's income tax for fiscal 1976, in violation of 18 U.S.C. 371 (Count Three). Petitioner Ingredient Technology Corporation ("SuCrest") was also convicted of subscribing to a false federal income tax return for fiscal 1975, in violation of 26 U.S.C. 7206(1) (Count Four). Petitioner Rapaport was also convicted of assisting SuCrest in the presentation of its false tax return for fiscal 1975, in violation of 26 U.S.C. 7206(2) (Count Five). (Pet. App. A1-A4). SuCrest was sentenced to fines aggregating $25,000 (82-1526 Pet. 10). Rapaport was fined $7500 and sentenced to concurrent terms of two years' imprisonment, all but six months suspended, to be followed by 18 months' probation.

1. The evidence at trial showed that from 1974 through 1976 SuCrest was a publicly traded company. The bulk of its business was conducted by its Sweetener Division, which refined raw sugar and sold it to users of refined sugar. SuCrest was not in the business of selling raw sugar or buying raw sugar for resale (Pet. App. A4). From 1974 through 1976 Rapaport was the president and chief executive officer of SuCrest. His approval was required for every purchase of raw sugar (*ibid.*).

During 1974, SuCrest changed its inventory accounting method to the LIFO ("last in, first out") method (Pet. App. A4).[2] As the end of its 1975 fiscal year (May

---

[2] In 1974, the price of raw sugar began to fluctuate widely, and although SuCrest was making large gross profits as a result of price fluctuations upward, taxes on those profits and the escalating cost of raw sugar depleted its income. This motivated

31, 1975) approached, SuCrest's inventory was dramatically lower than it had been at the close of fiscal 1974 (Pet. App. A5).[3] To avoid having to compute its cost of goods sold on the basis of the lower-cost sugar remaining in its inventory (and therefore having to pay more income tax), SuCrest devised a series of sham transactions to increase its year-end inventory without incurring the expense and market risks of actually purchasing raw sugar.

At Rapaport's direction, SuCrest entered into an agreement with one of its suppliers, Czarnikow-Rionda Co. ("Rionda"). SuCrest was to buy from Rionda 50,000 long tons of raw sugar before the end of its 1975 fiscal year, then resell the sugar to Rionda after the close of the fiscal year. There was no risk to SuCrest, neither party would make a profit (apart from Rionda's "commission" of $84,000), and SuCrest would not take physical delivery of the sugar (Pet. App. A6-A7). To set different prices for the purchase and resale components of the transaction—and thereby create the appearance of an arms' length deal—the parties hinged the price to the market value of raw sugar on the futures exchange

---

SuCrest to adopt the LIFO method (Pet. App. A4). Under LIFO, a taxpayer is permitted to assume that the raw materials he used to make finished goods during the year were the latest-acquired raw materials. In an inflationary period, therefore, the LIFO method produces a higher cost of goods sold, which in turn results in lower taxable income. By adopting LIFO and making year-end purchases of large amounts of high-priced raw sugar, SuCrest was able to report and carry forward in 1974 a loss of about $14.7 million. It otherwise would have had to report taxable income of $12.2 million (Pet. App. A4-A5).

[3] Although SuCrest had accumulated an unusually large inventory of raw sugar before the end of fiscal 1974, it used much of this inventory during 1975 and 1976 rather than purchase additional raw sugar, because prices and interest rates were increasing (Pet. App. A5).

(*id.* at A6). The gains and losses on sale and resale, however, would be offset by gains and losses on futures contracts to be purchased by the parties (*id.* at A6-A7).

Pursuant to the agreement, SuCrest and Rionda executed a written contract on April 18, 1975, covering Rionda's sale of raw sugar to SuCrest (Pet. App. A7). At Rapaport's direction, a written contract for resale was not to be prepared until after the end of SuCrest's fiscal year (Tr. 167-168, 849). Rapaport told Nicholas Ponticelli, a Sweetener Division raw sugar buyer, that a written resale contract would nullify the whole transaction (Tr. 1281). Rionda was concerned, however, about substantiating the oral agreement to resell. Jack Sexer, vice-president of SuCrest's Sweetener Division, therefore prepared a letter stating the terms of the resale, and he and a Rionda vice-president sealed it with sealing wax and placed it in the latter's safe. After the transaction was completed the two met and destroyed the letter (Pet. App. A7-A8).

In late May 1975, Rionda sent SuCrest a formal notice declaring title in SuCrest to the sugar, which was at sea on two ships. Just after the end of SuCrest's fiscal year, while the ships were still at sea, SuCrest "resold" the sugar to Rionda (Pet. App. A7). SuCrest included the sugar in its 1975 LIFO inventory calculations. During the period when SuCrest purportedly owned the sugar, however, Rionda declared title to the same sugar on one of the ships to another customer, pursuant to a contract made several weeks earlier (*ibid.*).

In carrying out the scheme, SuCrest and Rionda generated documents designed to give it an appearance of economic reality (Pet. App. A7). During SuCrest's 1975 audit these documents were shown to S.D. Leidesdorf & Company ("Leidesdorf"), SuCrest's auditors for many years. SuCrest personnel made false representations to the auditors and SuCrest's attorneys to conceal the fact that the resale of the sugar had been

prearranged.[4] As a result, SuCrest understated its 1975 operating profit by about $13.7 million (*id.* at A8).

SuCrest and Rionda agreed to a similar purchase and resale scheme for fiscal 1976. In August of 1975 the price of sugar, after declining steadily since April, turned upward. Rapaport decided to use the scheme with Rionda to lock in a high price for SuCrest's 1976 inventory calculations (Tr. 873-874). SuCrest and Rionda executed a written contract, dated August 5, 1975, for Rionda's sale of 60,000 long tons of sugar to SuCrest, with title to be declared to SuCrest in May of 1976 (Pet. App. A9). Throughout the rest of fiscal 1976, however, neither the sugar "purchase" nor a related $22 million futures position was reflected in SuCrest's internal operating records, since the sugar was never intended to be used in the ordinary course of business (Tr. 591, 1355-1360, 1485; G. Exh. 203A). In late May 1976, Rionda declared title to the sugar in SuCrest; during June, SuCrest "resold" the sugar to Rionda (Pet. App. A9).

The phony purchase was presented to the auditors in SuCrest's 1976 year-end calculations (Pet. App. A9). However, when Leidesdorf sought to confirm an oral report that the resale had been prearranged, SuCrest's management represented that the resale had not been planned before the end of the fiscal year (*id.* at A9-A10).[5]

On August 30, 1976, SuCrest's board of directors learned that the Rionda purchase and resale had been prearranged (Tr. 216-217). Afterward, Leidesdorf

---

[4] During negotiation of the agreement Rapaport cautioned subordinates to keep the plans secret, lest the auditors disallow inclusion of the sugar in SuCrest's inventory (Tr. 154, 157, 226, 848).

[5] Rapaport was present at meetings when the president and vice-president of the Sweetener Division, without contradiction by Rapaport, gave false explanations for the resale (Pet. App. A9-A10).

expanded its audit procedures, the board retained the law firm of Milbank, Tweed, Hadley & McCloy ("Milbank, Tweed") to attempt to ascertain the facts, and the Securities and Exchange Commission took testimony (Tr. 234-235, 1604-1607, 1697). Both Milbank, Tweed and Leidesdorf concluded that the Rionda transactions had no substance and that the bogus purchases should not be included in the computation of SuCrest's cost of goods sold for fiscal 1975 and 1976 (Tr. 1607, 1700-1702; G. Exhs. 2, 418). In February 1977, SuCrest filed its fiscal 1976 tax return based on calculations which gave no recognition to the Rionda transactions.

2. The court of appeals affirmed the convictions (Pet. App. A27-A28). The court concluded that as a matter of law the Rionda sugar was not includable in SuCrest's LIFO inventory, since the sugar was never intended to be used in SuCrest's trade or business and was in the taxpayer's control only "about as long as the pea in the proverbial shell game is under the shell" (*id.* at A16). The court also rejected petitioners' contention that the applicable tax law was unclear, thereby negating the element of willfulness. The court pointed out that petitioners (*id.* at A18)

> surely * * * knew they were committing a wrongful act. * * * The resale component of the agreement was concealed. The auditors were lied to, as were the attorneys. The secret letter sealed with wax was hidden in a safe and then destroyed.

In addition, the court found no merit to petitioners' "more sophisticated argument" (Pet. App. A18) that the district court had erred in excluding testimony offered by two of petitioners' experts, and in deciding not to instruct the jury in the terms of the applicable Treasury Regulation. According to petitioners, the trial court's failure to do so thwarted their defense that they could not have formed a willful intent. The court found that "prior cases on willfulness consistently require fac-

tual evidence of the defendant's state of mind to negate willfulness" (*id.* at A19). In this case, by contrast, "there was no evidence that Rapaport or anyone else at SuCrest genuinely thought that what they were doing was lawful" *(ibid.)*. The court did not find that its holding conflicted with the decision of the Fifth Circuit in *United States* v. *Garber*, 607 F.2d 92 (1979) (en banc), since in that case the defendant presented the defense that she "'subjectively thought that proceeds from the sale * * * were not taxable'" (Pet. App. A19). In any event, the court noted that the Fifth Circuit had itself limited *Garber* in a subsequent case (*id.* at A20).

ARGUMENT

1. SuCrest contends (82-1526 Pet. 11-16) that its conviction was based on an unforeseeable interpretation of the Internal Revenue Code and regulations pertaining to inventories, depriving it of its right to fair notice. SuCrest argues (*id.* at 12-13) that it met every formal requirement of the Code and regulations, and that the court of appeals retroactively expanded criminal liability by "read[ing] into the statute a 'business purpose' requirement." The applicable law, however, was clear and well established.

Section 1.471-1 of the Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.) provides that inventories are necessary "in every case in which the production, purchase, or sale of merchandise is an *income-producing* factor" (emphasis added), and that raw materials are only to be included in inventory if they have been acquired for sale or will physically become a part of merchandise intended for sale. Over 50 years ago, the Second Circuit held that under this regulation "sale" means a sale for profit. *Francisco Sugar Co.* v. *Commissioner*, 47 F.2d 555, 557 (1931) (L. Hand, J.). See also *Grant Oil Tool Co.* v. *United States*, 381 F.2d 389, 398 (Ct. Cl. 1967); *Pierce-Arrow Motor Car Co.* v. *United States*, 9 F. Supp. 577,

584-585 (Ct. Cl. 1935). As the court of appeals recognized (Pet. App. A14), SuCrest never intended to refine the Rionda sugar, was not in the business of buying and reselling raw sugar, and did not enter into the agreements with Rionda in order to produce income. The transactions affected no beneficial interest other than the reduction of taxes. Thus, SuCrest did not meet all the requirements of the regulation for inclusion of the sugar in its inventory, and there was nothing new or unforeseeable in the court of appeals so holding.[6]

The holding of the court of appeals was also compelled by the well-settled principle that the substance of a transaction prevails over its form in matters of taxation. *E.g.*, *Knetsch* v. *United States*, 364 U.S. 361 (1960); *Commissioner* v. *Court Holding Co.*, 324 U.S. 331, 334 (1945); *Griffiths* v. *Commissioner*, 308 U.S. 355, 357-358 (1939); *Higgins* v. *Smith*, 308 U.S. 473 (1940); *Gregory* v. *Helvering*, 293 U.S. 465, 468-469 (1935). That principle is applicable unless an examination of the statute and its purpose reveals that form was intended to be determinative. *Knetsch*, *supra*, 364 U.S. at 367; *Glazer* v. *Commissioner*, 44 T.C. 541, 545-546 (1965). SuCrest points to nothing showing such an intent with respect to the inventory rules.[7] Further,

---

[6] *William Powell Co.* v. *United States*, 524 F. Supp. 841 (S.D. Ohio 1981), which SuCrest cites (82-1526 Pet. 12 n.*), does not support the proposition that merchandise acquired without a business purpose may be included in a LIFO inventory. The court, construing 26 U.S.C. 472(c), held only that that section did not condition use of the LIFO method on the existence of a business purpose. 524 F. Supp. at 845-846. The court did not address the requirements for inclusion of goods in inventory.

[7] SuCrest advances the notion that because LIFO is a "theoretical method of accounting for inventory * * *, the purpose of the statute would not be served by reading into it a requirement of 'substance over form' or 'business purpose'" (82-1526 Pet. 14). But while LIFO uses a fictitious assumption about the flow

well before petitioners committed the offenses in this case, the Tax Court had held that the economic realities of transactions control in the computation of the costs of goods purchased for sale. *Brooks-Massey Dodge, Inc.* v. *Commissioner*, 60 T.C. 884, 891-892 (1973); *Estate of Nottingham*, 25 T.C.M. (P-H) ¶ 56,281 (1956). See also Rev. Rul. 60-243, 1960-2 Cum. Bull. 160. In light of these precedents, the insistence on "substance over form" could hardly be characterized as unforeseeable.

SuCrest's reliance (82-1526 Pet. 15) on *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), *Douglas* v. *Buder*, 412 U.S. 430 (1973), and *Marks* v. *United States*, 430 U.S. 188 (1977), is entirely misplaced. Unlike those cases, where the statute or other applicable law gave no warning that the charged act was an offense, the interpretation of the inventory rules here is clearly compelled by the language of Section 1.471-1 of the Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.), which correlates the use of inventories with the production of income. SuCrest cites no judicial or administrative authority adopting a contrary interpretation of the inventory rules, and there is thus nothing to support a conclusion that the interpretation adopted by the courts below was unforeseeable.

The absence of conflicting authorities also distinguishes this case from *James* v. *United States*, 366 U.S. 213 (1961),[8] and *United States* v. *Critzer*, 498

---

of goods and Congress has approved that method, it does not follow that the underlying transactions that are being accounted for—the purchases and sales of goods—can be equally fictitious.

[8] In *James*, the defendant had been convicted of attempted income tax evasion for failing to report embezzled funds. This Court held such funds taxable, overruling a prior decision, *Commissioner* v. *Wilcox*, 327 U.S. 404 (1946), in which it had held to the contrary. The vitality of *Wilcox* had been undermined earlier by *Rutkin* v. *United States*, 343 U.S. 130 (1952). Despite the holding as to the taxability of embezzled funds in *James*, this Court reversed the conviction. In a plurality opinion, three Justices concluded that willfulness could not be prov-

F.2d 1160, 1162-1164 (4th Cir. 1974),[9] on which SuCrest relies (82-1526 Pet. 16-17). Unlike those cases, where the question of taxability was uncertain because of conflicting court decisions or government positions, there was no uncertainty here over the requirements to be met for inclusion of goods in inventory.

Contrary to SuCrest's assertion (82-1526 Pet. 14-15), the issuance of Rev. Rul. 79-188, 1979-1 Cum. Bull. 191, in 1979 does not prove that the law was unclear in 1975 and 1976, when the charged offenses occurred. In that ruling, the Internal Revenue Service held that property not intended by the taxpayer to be used in business could not be included in inventory for the purpose of avoiding invasion of a LIFO base. However, as the court of appeals pointed out (Pet. App. A17 n.8),

> the ruling goes to different facts, since under it the purchase and resale were not prearranged, the prices were not structured to eliminate the possibility of profit or loss on the resale, and there were no indicia of concealment. Moreover, as Revenue Ruling 79-188 itself points out, "the purpose for which raw material is purchased is a major factor whether such material is inventoriable by the taxpayer," and has been since *Latimer-Looney Chevrolet, Inc. v. Commissioner*, 19 T.C. 120 (1952) *acq'd in* 1953-1 C.B. 5, which the Ruling cites for that proposition.[10]

---

en so long as the tax statute contained the gloss placed on it by *Wilcox*. 366 U.S. at 221-222.

[9] In *Critzer*, "co-ordinate branches of the United States Government" (498 F.2d at 1162) had reached directly opposing conclusions as to the taxability of income the defendant had failed to report. The Fourth Circuit concluded that in light of this circumstance, as a matter of law, the requisite intent to evade and defeat income taxes was missing. *Ibid.*

[10] Even before *Latimer-Looney*, the purpose for which materials were purchased was held to be a controlling factor in determining whether the materials were inventoriable. See, *e.g.*, *Francisco Sugar Co.* v. *Commissioner*, *supra*, 47 F.2d at 557.

Thus the Ruling did not signify any lack of clarity in the law.

Even if the law had been open to good faith differences of opinion, this case would present no notice problems under the Due Process Clause, since the crimes of which petitioners were convicted required specific intent to commit prohibited acts. Such a scienter requirement "relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 102 (1945); see also *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342 (1952); *United States* v. *Ragen*, 314 U.S. 513, 524 (1942); *Gorin* v. *United States*, 312 U.S. 19, 26-28 (1941); *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 502-503 (1925). As this Court said in *Ragen*, *supra*, 314 U.S. at 524: "A mind intent upon willful evasion is inconsistent with surprised innocence." In this case, the evidence demonstrates that petitioners were not surprised. As the court of appeals determined (Pet. App. A18):

> Here surely the defendants knew they were committing a wrongful act. * * * The resale component of the agreement was concealed. The auditors were lied to, as were the attorneys. The secret letter sealed with wax was hidden in a safe and then destroyed. * * * Willful intent was a question of fact decided by the jury at trial contrary to the defendants.

2. SuCrest also contends (82-1526 Pet. 16-20) that the court of appeals improperly used a subjective test (petitioners' actual knowledge and intent) rather than an objective test (whether a person of ordinary intelligence would have had fair notice) in judging SuCrest's claim that it was deprived of fair notice. But the court of appeals in fact concluded that the objective test had been satisfied. The court agreed (Pet. App. A17) that "a criminal statute must * * * be sufficiently definite as to 'give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.' *United States*

v. Harris, 347 U.S. 612, 617 (1954)." Nothing in its opinion suggests a belief that the law was uncertain, but could be applied against petitioners simply because of their subjective state of mind. Rather, in rejecting petitioners' argument that Revenue Ruling 79-188 implied uncertainty, the court indicated the contrary (Pet. App. A17 n.8): "The issuance of the LIFO Revenue Ruling in 1979 * * * by no means signifies a lack of clarity in the law at the time the SuCrest-Rionda transaction was entered into in 1975." The court's focus on petitioners' actual knowledge and intent (*id.* at 18a) simply emphasized that this is not a case where an unknowing party has been trapped by a law of which he was justifiably unaware.

3. Petitioner Rapaport contends (82-1458 Pet. 12-15) that the tax law applicable to the SuCrest-Rionda transactions was uncertain, and that the trial court erred in refusing to instruct the jury that it could consider this uncertainty in deciding about willfulness. Rapaport further contends (*id.* at 15-16) that the trial court erred in excluding expert testimony on the applicable tax law. He contends that the court of appeals' decision rejecting these claims conflicts with *United*

States v. *Garber*, 607 F.2d 92 (5th Cir. 1979).[11] These contentions are without merit.

Garber was convicted of income tax evasion for failure to report income from the sale of her blood plasma. The en banc Fifth Circuit reversed (four judges dissenting) and ordered a new trial. The majority held that in light of the uncertainty in the applicable law about the taxability of the proceeds from the sale of one's blood plasma, the trial court had erred in excluding expert testimony as to the tax law and in refusing to instruct the jury that a reasonable misconception of the tax law on defendant's part would negate the necessary criminal intent.

While we believe that *Garber* was wrongly decided, the court of appeals in any event correctly held (Pet. App. A18-A20) that *Garber* is inapposite here.[12]

---

[11] Rapaport also argues (82-1458 Pet. 15-16, 18-19) that the Ninth Circuit followed *Garber* in *United States* v. *Clardy*, 612 F.2d 1139, 1153 (1980), and that the decision in this case therefore conflicts with *Clardy* as well. The court in *Clardy* stated that the government's expert testimony about the impropriety of an interest deduction was relevant to the issue of willfulness, since the defense theory was that there was a good faith dispute about the interpretation of the tax laws. The court did not hold, however, that exclusion of expert testimony on the law would be error. Indeed, the court stated that the trial court exercises broad discretion in determining whether to admit or exclude expert testimony, and that its determination must be sustained unless manifestly erroneous (612 F.2d at 1153). There is thus no reason to believe that the Ninth Circuit would follow *Garber* in a case such as this.

Rapaport also notes (82-1458 Pet. 12 n.12) that in *United States* v. *Baskes*, 687 F.2d 165, 168-169 (1981), the Seventh Circuit mentioned that a tax attorney testified as an expert witness for the defense. However, as Rapaport acknowledges, the court cited neither *Garber* nor *Clardy*. Nor did the court state whether exclusion of expert testimony on the law would have been error.

[12] In addition to distinguishing *Garber*, the Second Circuit declined to follow it to the extent it was inconsistent with the Second Circuit's decisions in *United States* v. *Bronston*, 658

Garber involved a tax question that "was completely novel and unsettled by any clearly relevant precedent." 607 F.2d at 100. Here, by contrast, there was ample precedent supporting the lower courts' interpretation of the applicable tax law.[13] Moreover, in *Garber* "[t]he de-

---

F.2d 920, 930 (1981), cert. denied, 456 U.S. 915 (1982), and *Marx & Co.* v. *Diners' Club, Inc.*, 550 F.2d 505, 509-510, cert. denied, 434 U.S. 861 (1977). In those cases, the Second Circuit adhered to the principle that expert testimony on the law is generally inadmissible. The Second Circuit's view is in accord with the weight of authority. *Cooley* v. *United States*, 501 F.2d 1249, 1254 (9th Cir. 1974), cert. denied, 419 U.S. 1123 (1975); *Loeb* v. *Hammond*, 407 F.2d 779, 781 (7th Cir. 1969); *White* v. *United States*, 216 F.2d 1, 5 (5th Cir. 1954); *United States* v. *Caserta*, 199 F.2d 905, 909 (3d Cir. 1952); *Lisansky* v. *United States*, 31 F.2d 846, 851 (4th Cir.), cert. denied, 279 U.S. 873 (1929); see also 7 J. Wigmore, *Wigmore on Evidence* § 1952 (Chadbourn rev. 1978).

The *Garber* majority held the opinion evidence admissible on the theory that a defendant is "entitled to wide latitude in the introduction of evidence tending to show lack of intent." 607 F.2d at 99. But the cases cited for that principle do not support the proposition that evidence unrelated to a defendant's actual intent should be admitted. In fact, the cases are to the contrary. See 607 F.2d at 106-107 (Ainsworth, J., dissenting). Thus, under the weight of authority, expert testimony misconstruing the law is not admissible unless the defendant has actually relied upon it. Here, of course, there was no evidence that the defendants had done so.

[13] Petitioner Rapaport contends (82-1458 Pet. 9, 13) that the trial court acknowledged that the tax law was unclear in 1975 and 1976. The court stated: "You might be entirely correct about that if this were a civil proceeding, but it is not. *The fact that it was not in writing and the effect of this does not, it seems to me, negate the issue of whether or not there has been a violation of the criminal law.* In the civil area you might be correct" (Tr. 1815; emphasis added). In his petition, Rapaport omits the emphasized language, which helps to put the court's statement in perspective. The court made the statement (during argument on a motion for acquittal) in response to a technical argument that SuCrest was permitted to include the Rionda sugar in its inventory because the agreement to resell the sugar was unenforceable under the New York statute of frauds (Tr.

fendant testified that she subjectively thought that proceeds from the sale of part of her body were not taxable." 607 F.2d at 99. Here, as the court of appeals observed (Pet. App. A19), there was no evidence that Rapaport or anyone else at SuCrest genuinely thought that inclusion of the Rionda sugar in inventory was proper.[14]

Garber plainly turned on the evidence of the defendant's subjective belief.[15] The court there found the excluded expert testimony relevant to buttress Garber's explanation of her failure to report the income from the sale of her blood plasma: "By disallowing Nall's testimony that a recognized theory of tax law supports Garber's feelings, the court deprived the defendant of evidence showing her state of mind to be reasonable." 607 F.2d at 99. As to the refused instruction, the ma-

---

1814-1815). The court obviously recognized that formalities as to ordinary commercial contracts have no place where a criminal conspiracy is involved. The court did not indicate that it believed the tax law to be uncertain. Indeed, during a later colloquy concerning instructions, it expressly asserted the contrary (Tr. 1971).

[14] Rapaport suggests (82-1458 Pet. 9, 17) that his good-faith belief in the propriety of the transactions is demonstrated by the testimony of Charles Azarow, president of SuCrest's Sweetener Division. According to Rapaport, Azarow "testified that * * * 'Mr. Rapaport continued to believe that that situation was an appropriate one despite the acknowledgement of the oral agreement'" (*id.* at 9). In fact, the statement quoted by petitioner was simply read to Azarow on cross-examination (Tr. 327-328, 430). Azarow acknowledged having made the statement, though he did not reaffirm its truth. The fact that the petitioner can find no better support in the record for his claim of good faith is of itself eloquent testimony to the accuracy of the court of appeals' observation.

[15] Contrary to Rapaport's assertion (82-1458 Pet. 18), *Garber* did not hold that a subjective belief as to the legality of a defendant's conduct is irrelevant to willfulness where the law is ambiguous. The majority rather held that the ambiguity was relevant to an assessment of the defendant's subjective state of mind. 607 F.2d at 99.

jority stated: "The court erred by refusing to instruct the jury that a reasonable misconception of the tax law on her part would negate the necessary intent" (*ibid.*).[16]

On the other hand, where there is no evidence that a defendant believed in good faith that his conduct was proper,[17] there is no factual basis for an instruction on a reasonable misconception of the law, and expert evidence as to the state of the law lacks even the dubious probative value found in *Garber*. Such evidence cannot, by itself, reasonably give rise to an inference that a defendant lacked criminal intent, since the defendant may fully understand the law notwithstanding its alleged ambiguities. Moreover, a rule requiring the admission of such evidence in any case where a defendant disputes the interpretation of the tax laws would inevitably invite juries to form their own opinions about the applicable law. Thus if it is ever admissible—a proposition which we do not concede—expert evidence on the law can, at best, be relevant only to buttress a defendant's claimed belief that his conduct was lawful. Accordingly, even if *Garber* was correctly decided, the Second Circuit properly read the decision as limited to situations in which a defendant has presented evidence of a subjective belief in the lawfulness of his conduct, and

---

[16] In this case petitioners requested that the jury be instructed on the actual language of the governing tax law at the time of the Rionda transactions, and that the jury be told that it could consider the relative clarity of the tax law in determining willfulness. Such an instruction was not considered in *Garber*. Clearly, the requested instruction would have invaded the province of the court as to the issue of the clarity of the law, and would have invited the jury to make legal assessments that were beyond its competence.

[17] Contrary to Rapaport's suggestion (82-1458 Pet. 17-18), the court of appeals did not hold that under its reading of *Garber* a defendant had to testify in order to get an instruction on the state of the law. It simply noted a lack of evidence of *any* kind showing that Rapaport had an innocent state of mind (Pet. App. A19).

there is no assurance that the Fifth Circuit would have decided the present case any differently from the Second Circuit.[18]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
GLENN L. ARCHER, JR.
Assistant Attorney General
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

MAY 1983

---

[18] Indeed, the Fifth Circuit has indicated that *Garber* should be read narrowly. See *United States* v. *Herzog*, 632 F.2d 469, 473 (1980), rehearing and rehearing en banc denied, 636 F.2d 315 (1981). There, the defendant was convicted of filing withholding forms in which he falsely represented that he was exempt from taxes. He testified that he filed the forms claiming a total exemption because he believed that his wages were not taxable. He also testified that he found the Internal Revenue Code contradictory and confusing. 632 F.2d at 471. Herzog attempted to introduce expert testimony on the complexity of the tax law, but the testimony was excluded. A majority of the *Herzog* panel concluded that *Garber* was inapplicable and that the evidence was properly excluded. 632 F.2d at 473. The court found that the defendant was not accused of failing to report something that he received as income, as was Garber; rather he was "charged with filing false exemption forms, and no amount of expert testimony could help him in this regard" *(ibid.)*.